No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Petitioner*

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 41) is not reported. The order on judgment of the District Court (R. 30-31) and the order of the District Court denying the motion of the United States to resettle the order on judgment (R. 36) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1959 (R. 42). On January 12, 1960, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including March 14, 1960. The petition was filed on that day and granted on May

16, 1960. 362 U.S. 973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government is entitled to have the order of dismissal of the denaturalization complaint against respondent, directed by this Court in *Lucchese* v. *United States*, 356 U.S. 256, specify that the dismissal is without prejudice to the filing of a new complaint.[1]

RULE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> (b) *Involuntary Dismissal: Effect Thereof.*
>
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court

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[1] In *Costello* v. *United States*, No. 59, this Term, the petitioner moved to amend his petition for a writ of certiorari to raise a somewhat different but related issue. On May 16, 1960, this Court assigned that motion for hearing with the argument on the merits in this case. 362 U.S. 973. Since the issues on the motion in *Costello* arise in a different context, we are briefing them separately.

renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT

On November 17, 1952, a denaturalization complaint was filed against respondent in the United States District Court for the Eastern District of New York (R. 1-6). In accordance with the then current practice, the "good cause" affidavit required by the pertinent statute (now 8 U.S.C. 1451(a)) was not filed with the complaint. The District Court, on respondent's motion, entered a dismissal order conditioned on failure to file the affidavit within fifteen days (R. 11, 14, 23). The affidavit was so filed (R. 7-8). On reargument following the decision in *United States* v. *Zucca*, 351 U.S. 91,[2] and before trial, the District Court dismissed the complaint for failure to file the affidavit with the complaint, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit" (R. 14-15; 149 F. Supp. 952). On appeal by the government, the Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied (R. 17-27; *United States* v. *Lucchese*, 247

[2] In that case this Court held that the filing of the affidavit of good cause was a prerequisite to the initiation of a denaturalization proceeding

F. 2d 123). On April 7, 1958, this Court reversed the judgment of the Court of Appeals and ordered the case "remanded to the District Court with directions to dismiss" the complaint (R. 29; *Lucchese* v. *United States* (together with *Matles* v. *United States*, and *Costello* v. *United States*), 356 U.S. 256, 257).[3]

Upon remand pursuant to this Court's judgment, the government submitted to the District Court a proposed form of order dismissing the complaint "without prejudice." (R. 33). The District Court (Inch, D.J.) rejected this form and, instead, on July 16, 1959, entered an order of dismissal which did not specify whether it was with or without prejudice (R. 30-31). The government moved for settlement of the dismissal order. At the argument of the motion, government counsel sought to ascertain from the District Court whether in entering the order the court was in any way passing on the question of whether the dismissal constituted a bar to subsequent action by the government looking to the denaturalization of respondent. The District Court responded that it was going no further than to follow this Court's direction that the complaint be dismissed. (R. 34-35). The motion for resettlement was denied on July 24, 1959 (R. 36).

The government appealed to the Court of Appeals for the Second Circuit from so much of the order of

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[3] The *per curiam* order read in pertinent part (356 U.S. at 257): "In Nos. 450 [*Lucchese*] and 494 [*Costello*] the judgments of the Court of Appeals for the Second Circuit are reversed and the cases are remanded to the District Court with directions to dismiss the complaints. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U.S. 91, 99-100."

dismissal as provided for mere dismissal of the denaturalization complaint and failed to specify that the dismissal was without prejudice, and from the order, *supra*, denying the motion for resettlement of the order of dismissal (R. 37). On October 15, 1959, the Court of Appeals, on respondent's motion, dismissed the government's appeal (R. 41-42). The *per curiam* order dismissing the appeal said (*ibid.*):

> Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

SUMMARY OF ARGUMENT

As explained in our petition for a writ of certiorari, the government sought review of the order of the Court of Appeals in this case primarily to protect its interests pending the determination of a related question in *United States* v. *Costello*, No. 59, this Term. In both cases, affidavits had not been filed with the complaints, this Court remanded the cases to the respective District Courts with directions to dismiss the complaints, and the District Courts (considering themselves bound to dismiss the denaturalization complaints without qualifying language) entered orders of dismissal which did not specify whether they were with or without prejudice. Thereafter, in a new denaturalization action instituted against him, Costello contended that the government should have appealed from the order entered on remand if it wished to have the dismissal operate as without prejudice. This contention was

rejected by the District Court and by the Court of Appeals. However, since this Court had not ruled on the matter, the government filed a petition for a writ of certiorari in the present case to preserve its right to proceed against this respondent in a new proceeding in the event that this Court should rule in *Costello* that the order entered by the District Court on the remand of that case precluded the institution of a new denaturalization action in *Costello,* and that the government's failure to appeal from that order barred the subsequent suit. It is our position that the District Courts erred in concluding that they lacked authority to add the words "without prejudice" to the orders of dismissal, but that the government was not barred from instituting a new denaturalization proceeding by the omission of these words, since there has never been an adjudication on the merits of either case.

I

When this case came before this Court in 1958, the District Court had entered an order dismissing the denaturalization complaint "without prejudice" to the government's right to institute a proceeding to denaturalize the defendant upon the contemporaneous filing of the required affidavit. The Court of Appeals then reversed, holding that the affidavit need not be filed with the complaint. The only question which this Court decided was whether a complaint should be dismissed for lack of an accompanying affidavit. When, therefore, the Court reversed the judgment of the Court of Appeals and remanded the cause to the District Court with directions to dismiss the complaint, it was upholding the original action of the District Court in dismissing the complaint without prejudice.

Moreover, the 1958 decision of this Court in this case was placed squarely on the Court's earlier decision in *United States* v. *Zucca*, 351 U.S. 91. In that case, on the government's failure to file an affidavit of good cause, the District Court had dismissed the complaint without prejudice to the government's right to institute a new denaturalization action upon filing the affidavit. This Court expressly affirmed that action. Thus, the Court's decision in this case, remanding the cause with directions to dismiss, appears quite clearly to have contemplated a dismissal without prejudice.

II

Since, as we have shown, the decision of this Court at the earlier stage of this case clearly contemplated a dismissal without prejudice, the District Court had power to enter a judgment specifically so providing, even though this Court merely remanded the cause with directions to dismiss the complaint. While a lower court cannot reconsider questions which the mandate has laid at rest, it is free as to any issue within its jurisdiction which was not settled by the higher court's decision. This Court has always construed its own mandates so as to restrict the area of compelled obedience to the precise issues expressly or necessarily decided by this Court.

Here, the reinstatement of the original judgment dismissing the complaint "without prejudice" involved no departure from the issues decided by this Court, in 1958, in *Lucchese* v. *United States*, 356 U.S. 256. Such a judgment would merely have made explicit the implication of this Court's mandate. The District

Court, therefore, had the power to enter, and should properly have entered, a judgment dismissing the complaint without prejudice.

ARGUMENT

As explained in our petition for a writ of certiorari, the government sought review of the order of the Court of Appeals in this case primarily to protect its interests pending the determination of a related question in *United States* v. *Costello,* No. 59, this Term. In the *Costello* case, as in this one, an affidavit had not been filed with the complaint. In *Costello,* as here, this Court remanded the cause to the District Court with directions to dismiss the complaint. 356 U.S. 256. The District Court in that case (the District Court for the Southern District of New York), like the District Court in this case, considered itself bound by the terms of this Court's mandate to dismiss the denaturalization complaint without qualifying language and entered an order of dismissal which did not specify whether it was with or without prejudice. Thereafter, in a new denaturalization action instituted against him, Costello contended that the new action was barred since the first had not been dismissed without prejudice; and that the government, if it had wished to have the first dismissal operate as without prejudice, should have appealed from the order entered by the District Court after the remand by this Court. This contention was rejected by the District Court and by the Court of Appeals. However, since this Court had not ruled on the matter, the government filed a petition for a writ of certiorari in the present case to preserve its right to proceed against this respondent in a new proceeding in the event that this Court should rule in *Costello* that

the order entered by the District Court on the remand precluded the institution of a new denaturalization action in *Costello*, and that the government's failure to appeal from that order barred the subsequent suit.

As we shall argue in *Costello*, we believe that the Court of Appeals in that case properly ruled that dismissal of the complaint pursuant to the mandate of this Court for failure to file an affidavit with the complaint did not bar the institution of a new action, and that the government was not required to insist that the order of dismissal specify that it was without prejudice. However, we also believe that in this case under the mandate of this Court the District Court did have authority to reinstate the order appealed from (dismissing the action without prejudice) and that the division of the Court of Appeals which decided this case[4] was in error in ruling that the District Court could not add the words "without prejudice" to the order of dismissal. The addition of such words would carry out the clear intent of this Court in remanding the cause and therefore would be entirely consistent with the mandate.

I

The Decision of This Court Contemplated Dismissal of the Complaint Without Prejudice

When this case came before this Court in 1958, the District Court had entered an order dismissing the denaturalization complaint "without prejudice" to the

[4] The division of the court below which decided the *Costello* case said in its opinion in that case: "There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be 'without prejudice'. However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken • • •". 275 F. 2d 355, 361.

government's right to institute a proceeding to denaturalize the defendant upon the contemporaneous filing of the required affidavit (R. 14-15). There had been no consideration of the merits of the action. The Court of Appeals then reversed, holding that the affidavit need not be filed with the complaint (R. 24, 247 F. 2d 123, 128). With the case in this posture, this Court reversed the judgment of the Court of Appeals and directed the District Court to dismiss the complaint. The only question which the Court decided was whether a complaint should be dismissed for lack of an accompanying affidavit. When, therefore, the Court reversed the judgment of the Court of Appeals and remanded the cause to the District Court with directions to dismiss the complaint, it was upholding the original action of the District Court in dismissing the complaint. Since the original dismissal was "without prejudice", the action affirmed by the decision of this Court was a dismissal without prejudice.

Moreover, the decision in *Lucchese* v. *United States*, 356 U.S. 256, was placed squarely on the Court's earlier decision in *United States* v. *Zucca*, 351 U.S. 91. In that case, on the government's failure to file an affidavit of good cause, the District Court had dismissed the complaint *without prejudice* to the government's right to institute a new denaturalization action upon filing the affidavit. The Court of Appeals affirmed and this Court granted certiorari to resolve a conflict among the Courts of Appeals (*id.* at 92). The Court then affirmed the judgments of the lower courts, holding that in denaturalization proceedings the affidavit of good cause must be filed "as a prerequisite to the initiation of such proceedings", and adding that the District Court "correctly dismissed the proceedings in this case

because of the failure of the Government to file the required affidavit * * * " (*id.* at 100). The action which this Court expressly affirmed was a dismissal without prejudice.[5] Thus, the Court's decision in *Lucchese, supra,* remanding the cause with directions to dismiss, appears quite clearly to have contemplated a dismissal without prejudice.

II

The District Court Had Authority Under the Mandate to Specify That the Dismissal Was Without Prejudice

Since, as we have shown, the decision of this Court at the earlier stage of this case clearly contemplated a dismissal without prejudice, the District Court had power to enter a judgment specifically so providing, even though this Court merely remanded the cause with directions to dismiss the complaint. While it is "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest," (*Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 140), that mandate leaves the lower court free as to any issue within its jurisdiction which was not settled by the higher court's decision. *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 168; *Ex Parte Century Indemnity Company,*

[5] In *United States* v. *Diamond*, 356 U.S. 257, which was decided on the same day as *Lucchese* v. *United States*, 356 U.S. 256, the affidavit of good cause was filed on the first day of trial, rather than on the date the complaint was filed. When *United States* v. *Zucca, supra,* was decided, the District Court in *Diamond* dismissed the denaturalization action without prejudice (Pet. p. 4, No. 771, O.T. 1957). In a *per curiam* opinion this Court granted the government's petition for a writ of certiorari and affirmed the judgment of the Court of Appeals, which had itself affirmed the District Court's dismissal without prejudice.

305 U.S. 354, 355-356; *In re Sanford Fork and Tool Company*, 160 U.S. 247, 255-256; *Mason* v. *Pewabic Mining Company*, 153 U.S. 361, 366; *Christoffel* v. *United States*, 214 F. 2d 265, 266 (C.A. D.C.), certiorari denied, 348 U.S. 850; *Ohio Oil Company* v. *Thompson*, 120 F. 2d 831, 835 (C.A. 8), certiorari denied, 314 U.S. 658; see *Schuylkill Trust Company* v. *Pennsylvania*, 302 U.S. 506, 512; compare *National Association For The Advancement of Colored People* v. *Alabama*, 360 U.S. 240, 244-245; *Deen* v. *Hickman*, 358 U.S. 57, 58. This Court has always construed its own mandates so as to restrict the area of compelled obedience only to the precise issues expressly decided by this Court, and to such other issues as were necessarily decided by implication.

In *Ticonic Bank* v. *Sprague*, 303 U.S. 406, the Court held that a secured creditor of a national bank, holding a non-interest-bearing claim, was entitled to both principal and interest from the date of the insolvency of the bank even though the total assets of the bank were not sufficient to pay the claims of all creditors, so long as the security as to which the secured creditor had a lien was of sufficient value to pay both principal and interest. Under principles of *stare decisis*, Sprague, by establishing her claim, also established the claims of fourteen other trusts secured by the same assets to participate in those assets to the extent of both principal and interest. She therefore petitioned the District Court to allow the payment of reasonable attorney's cost out of the earmarked assets, although she had not purported to sue for a class nor sought formally to establish a fund available to the class. The District Court denied the petition, holding that this Court's mandate foreclosed that issue and deprived the

District Court of discretion to do anything except issue its execution for a certain sum of money plus costs between party and party. On writ of certiorari, this Court held (*Sprague* v. *Ticonic Bank*, *supra*, 307 U.S. 161, 168-169) that the claim for costs "as between solicitor and client" was not directly in issue in the original proceeding and was sufficiently different from that presented by the ordinary questions regarding taxable costs so that it was not impliedly covered by this Court's mandate.

Ex Parte Century Indemnity Company, *supra*, 305 U.S. 354, is another illustration of the proposition that this Court has held the operation of its mandates to narrow limits. There, the Court of Appeals had originally refused to consider certain assignments of error upon the ground that they related to findings requested by the defendant after the trial had been concluded. This Court reversed, holding that the point at which the defendant made his request was not too late to present special findings of fact. *Century Indemnity Company* v. *Nelson*, 303 U.S. 213, 216-217. On remand, the Court of Appeals refused to consider the assignments of error addressed to the rejection of these findings on the ground that the findings were not incorporated in the bill of exceptions—a ground not earlier considered by the lower court. This Court discharged its rule to shown cause why a writ of mandamus should not issue, holding that on these facts it could not direct the Court of Appeals to consider the assignments of error. 305 U.S. at 356. Necessary to this conclusion was the view that, on remand, the Supreme Court's mandate left the lower court free to find another sufficient ground (not earlier considered) for rejecting the assignments of error.

Here, the reinstatement of the original judgment dismissing the complaint "without prejudice" involved no departure from the issues decided by this Court in *Lucchese* v. *United States*, 356 U.S. 256. Such a judgment would merely have made explicit the implications of this Court's mandate. The District Court therefore had the power to enter, and should properly have entered, a judgment dismissing the complaint without prejudice.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause should be remanded to the District Court with directions that it enter a judgment dismissing the complaint without prejudice to the filing of a new complaint.

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